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No. 86-1744

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN A. SHORTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in excluding expert testimony concerning the characteristics of compulsive gamblers.

2. Whether Count One of the indictment, which charged attempted evasion of payment of taxes due for 12 tax years, was duplicitous.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 809 F.2d 54. Prior opinions of the district court (Pet. App. 16a-27a, 28a-46a) are reported at 608 F. Supp. 871 and 618 F. Supp. 255.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1987. A petition for rehearing was denied on March 5, 1987 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted of the felony of attempting to evade the payment of income taxes due for the years 1972 through 1983, in violation of 26 U.S.C. 7201, and six misdemeanor charges of failing to pay income tax for each of those years, in violation of 26 U.S.C. 7203. The district court sentenced him to 40 months' imprisonment on Count One, the tax evasion count. On the remaining counts, the court imposed concurrent sentences of six months' imprisonment. Pet. App. 2a. Petitioner was also fined $10,000. The court of appeals affirmed (*id.* at 1a-15a).

1. For each of the years 1972 through 1983, petitioner, an attorney in the District of Columbia, filed an income tax return on which he reported tax due and owing. Except for paying $36.40 toward a tax liability of over $3,000 for 1975, however, petitioner failed to pay any of his tax liability when he filed.[1] According to the returns, petitioner's total tax liability during the period amounted to nearly $135,000.

From at least 1973, petitioner conducted all of his professional and personal business in cash. He had no bank accounts or credit cards, and he acquired no assets, such as real property or automobiles, that could be attached by the IRS. However, his law partner, Bernadette Gartrell, had a number of credit cards and would charge purchases for petitioner on her credit cards. Petitioner would then reimburse Gartrell for the purchases in cash.

In the summer and fall of 1974, Gartrell opened two bank accounts for the firm's use. She opened the

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[1] The summary of the facts is taken from the government's brief in the court of appeals.

accounts in her own name, and she was the only signatory on the accounts. One account was used as an office account into which all fees received by the firm (including those received by petitioner) were deposited and from which the firm paid its expenses and partnership draws. The other was used as a reserve account to pay office expenses during periods when fees were not being collected.

Checks for partnership draws were made payable to cash. Although Gartrell endorsed her checks, petitioner did not endorse his. Instead, petitioner's checks were endorsed by Gartrell or the office secretary. Evidence at trial showed that the practice of drawing checks payable to cash made it difficult to trace funds through the bank accounts.

During IRS investigations into petitioner's ability to pay his taxes, petitioner was asked on several occasions whether he had any cash in bank accounts. Petitioner denied that he had any bank accounts; he never revealed the two accounts Gartrell had opened for the firm. Petitioner also claimed on a number of occasions that he lacked sufficient funds with which to pay his taxes. Notwithstanding these claims, petitioner spent substantial sums on a number of items. For example, he made half the payments of $200 to $300 per month on a $5,400 Rolex watch Gartrell purchased for him in December 1978. In addition, between December 1980 and July 1981 petitioner paid $10,000 in cash for furniture. The receipts for the furniture were in the name of a woman with whom petitioner was living.

Four IRS revenue agents who were assigned to petitioner's case over the years were unable to locate any assets belonging to petitioner. Finally, in June 1979, the case was referred to the IRS Criminal In-

vestigation Division (CID). The investigative efforts of the CID agents led to the discovery of the firm accounts. Petitioner was placed under surveillance and was observed entering one of the banks at which Gartrell had opened accounts for the firm. The IRS also obtained from another law firm two checks drawn by that firm and made payable to petitioner's firm. The IRS then issued summonses to the banks and to petitioner's law firm. Records obtained pursuant to the summonses showed that, during the relevant period, petitioner had received sufficient funds to pay his taxes each year.

Between April 1, 1980, and January 5, 1981, while the criminal investigation was in progress, petitioner made five payments to the IRS totalling $2,500. Prior to the criminal investigation, petitioner had repeatedly promised the IRS that he would make such payments. In the course of negotiating a payment plan during the criminal investigation, petitioner provided the IRS with a financial statement in which he made false claims regarding his expenses. Furthermore, while petitioner paid only $2,500 toward his tax liability, he gave his former wife a check for $6,500 during October 1980, which she deposited in her own account. She then withdrew various amounts from that account between October and December 1980 and gave the money to petitioner.

2. Prior to trial, petitioner moved to dismiss the tax evasion count, asserting that it was duplicitous. His position was that that count, which alleged that petitioner had evaded taxes owed for 12 tax years, charged 12 separate offenses. Pet. App. 3a. The district court concluded that "tax evasion covering several years may [be] charged in a single count as a course of conduct in circumstances such as these

where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years" (*id.* at 40a). Furthermore, to ensure that any guilty verdict would be unanimous, both with respect to at least one affirmative act of evasion and one tax-year delinquency, the court gave the jury a special unanimity instruction and required the jury to answer special interrogatories (*id.* at 3a). The court of appeals upheld the ruling of the district court on that issue (*id.* at 6a-7a).

3. Prior to trial, petitioner also filed a notice of defense based on mental condition pursuant to Fed. R. Crim. P. 12.2(b). The notice advised that petitioner intended to offer expert testimony with respect to a claim that he suffered from a compulsive, or pathological, gambling disorder (Pet. App. 8a). Petitioner asserted that the expert testimony would tend to negate willfulness. He argued that the testimony would show that he suffered from a disorder that compelled him to spend nearly all of his available financial resources on gambling, leaving him with no funds to meet his tax obligations. *Id.* at 8a-9a. Alternatively, petitioner argued that the expert testimony would provide an explanation for his cash lifestyle, his failure to keep financial records, and his failure to maintain bank accounts in his own name (*id.* at 9a).

The government moved to exclude the proffered evidence. Following a two-day evidentiary hearing, the trial court issued an order holding that the expert testimony was not admissible (Pet. App. 16a-27a). The district court noted that the courts that have addressed the issue have held that the link between pathological gambling and criminal intent has not

been sufficiently accepted by mental health professionals to render the disorder relevant to an insanity defense. The same analysis, the court held, would apply to the claimed link between pathological gambling and the element of willfulness. Pet. App. 21a-22a.

Apart from its reliance on the applicable precedents, the court concluded that expert evidence on the pathological gambling disorder was not relevant to the offenses charged, based on the expert testimony proffered outside the presence of the jury. The court heard testimony from the three defense experts, each of whom testified that pathological gamblers often fail to pay their taxes. Their testimony, the court observed, was "less certain" as to the existence of a link between the gambling disorder and the absence of a willful intent to commit tax offenses. Pet. App. 22a-23a. The court found the testimony of one of the defense experts to be "vague and contradictory" (*id.* at 23a), the testimony of the second expert to be of limited relevance to the issue (*id.* at 23a-24a), and the testimony of the third expert to support the view that an individual, such as petitioner, who embarks on a gambling spree "makes a volitional choice to gamble rather than pay" his tax liabilities (*id.* at 24a).

The court ultimately accepted the view of the government's expert witnesses, who testified that there exists no recognized link between pathological gambling and criminal tax offenses, and that the "vast majority" of psychiatrists reject the proposition that pathological gamblers are unable to choose between gambling and paying taxes. Pet. App. 24a-25a. Based on that testimony, the court was "firmly convinced" that there was no general acceptance of the

asserted link between pathological gambling and criminal tax offenses at the present time (*id.* at 25a).

The district court also rejected petitioner's alternative argument in favor of admission of the expert testimony—to explain his so-called "cash lifestyle," and thus to show that his conduct was not indicative of an intent to evade taxes. On this point, the district court observed that "the Court has been given no compelling indication suggesting that defendant's gambling activities and their impact on his financial habits require the testimony of experts, as opposed to lay witnesses familiar with the defendant's activities. When the specialized knowledge of an expert is unnecessary to a jury's assessment of the salient factual issues, expert testimony will normally be excluded" (Pet. App. 26a n.14 (citation omitted)).

The court of appeals agreed with the district court's analysis of the admissibility of the expert testimony. The court first noted that petitioner did not challenge on appeal the district court's exclusion of the proffered expert testimony on the ground that it was relevant to the element of willfulness. Instead, petitioner argued on appeal only that the expert testimony would have helped explain petitioner's "cash lifestyle" and thus negate the inference that his cash dealings were part of a scheme to evade taxes. Pet. App. 9a. The court of appeals then held that the district court had properly excluded the expert evidence for that purpose, since the specialized knowledge of an expert was not needed to explain the relationship between petitioner's gambling activities and his financial habits. Pet. App. 9a-10a, 14a. Based on the district court's analysis, the court of appeals concluded that "the District Court's careful determination that the proffered expert testimony was cumulative and unnecessary did

not constitute an abuse of discretion" (*id.* at 14a (citation omitted)). Although noting that petitioner had not pressed on appeal the admissibility of the expert testimony because of its relevance to the issue of willfulness, the court of appeals nonetheless agreed with the district court's conclusion that the expert testimony was excludable on that issue because there is no general acceptance among the experts in the relevant scientific community that there is a link between pathological gambling and the failure to pay taxes (*id.* at 10a-13a.)

ARGUMENT

1. Petitioner first contends (Pet. 10-18) that the district court erred in excluding the testimony of his expert witnesses. That testimony, he argues, was admissible to show that the conduct alleged by the government to constitute affirmative acts of evasion was instead the product of compulsive gambling.

In making this argument, petitioner asserts that his claim places in issue the continuing validity of the test established in *Frye* v. *United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), which held that the theory on which expert testimony is based must "be sufficiently established to have gained general acceptance in the particular field in which it belongs." That test, petitioner claims, has not survived the adoption of Rule 702 of the Federal Rules of Evidence, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Petitioner urges that the circuits are in conflict on validity of the *Frye*

test and that the conflict should be resolved by this Court. In fact, however, the judgment of the court in this case did not turn on the correctness of the *Frye* test, for several reasons.

To begin with, the evidentiary ruling that petitioner challenged in the court of appeals was not based on the *Frye* test. The only point petitioner argued in the court of appeals in support of the admissibility of the expert testimony was that it would provide an innocent explanation for his "cash lifestyle" (Pet. App. 9a, 14a). The district court held (*id.* at 26a n.14) and the court of appeals agreed (*id.* at 14a) that even if the evidence offered on that issue satisfied the reliability requirement of the *Frye* test, it was properly excluded on the ground that it was unnecessary. As the district court explained (*id.* at 26a n.14), the relationship between petitioner's gambling activities and his financial habits did not require the testimony of experts, but could readily be provided by "lay witnesses familiar with defendant's activities."

It is well settled that expert testimony may properly be excluded in the discretion of the trial judge if all the primary facts can be accurately and intelligently described to the jurors, and if the jurors, as persons of common understanding, are as capable of comprehending the primary facts and drawing correct conclusions from them as are witnesses with special or peculiar training, experience, or education. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States* v. *Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). Petitioner and persons familiar with his activities could have described his claimed gambling problems to the jury, and petitioner could have offered the explanation that his financial conduct

resulted from his alleged compulsion to gamble. There is no reason to believe that an average person serving on the jury would not have been able to understand the claim that a person wrapped up in gambling would let his financial affairs slide or that he would deal in cash to facilitate his gambling. Thus, even without regard to the *Frye* test, the district court was correct in ruling that expert testimony was not necessary in this case.

In any event, this case would not warrant review even if it were necessary, in order to affirm the district court's evidentiary ruling, to determine the reliability of the proffered expert testimony. Since the adoption of the Federal Rules of Evidence, a number of circuits have reaffirmed the *Frye* test. *United States* v. *Tranowski*, 659 F.2d 750, 755-756 (7th Cir. 1981); *United States* v. *Hendershot*, 614 F.2d 648, 654 (9th Cir. 1980); *United States* v. *Brady*, 595 F.2d 359, 362 (6th Cir.), cert. denied, 444 U.S. 862 (1979). Other courts have adopted a test balancing the reliability of expert testimony against its potential to mislead. *United States* v. *Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States* v. *Williams*, 583 F.2d 1194, 1197-1200 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979); *United States* v. *Baller*, 519 F.2d 463, 465-466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975). The difference between the two tests is not great and is not likely to lead to material differences in the outcome of similar cases in different circuits.

Both tests vest broad discretion in the trial judge. See, *e.g.*, *United States* v. *Downing*, 753 F.2d at 1240; *United States* v. *Brown*, 557 F.2d 541, 556 (6th Cir. 1977). In addition, the two tests are not as distinct as petitioner suggests: the *Frye* test has not been

applied restrictively to bar the admission of all but the most well-established scientific evidence, while the so-called "balancing test" requires a showing of some substantial scientific acceptance before permitting the admission of expert testimony. Thus, the Sixth Circuit, while reaffirming the *Frye* test, has "equated general acceptance in the scientific community with a showing that the scientific principles and procedures on which expert testimony is based are reliable and sufficiently accurate." *United States* v. *Brown*, 557 F.2d at 556, citing *United States* v. *Franks*, 511 F.2d 25, 33 n.12 (6th Cir.), cert. denied, 422 U.S. 1042 (1975). And while the Third Circuit concluded in *Downing* that a "pure" *Frye* approach was inappropriate under Rule 702, it recognized (753 F.2d at 1233) that *Frye* was a "seminal" case and that the "general acceptance" of a technique in the scientific community is an important, and often dispositive, factor in determining admissibility (*id.* at 1238 (citations omitted)):

> The district court in assessing reliability may examine a variety of factors in addition to scientific acceptance. In many cases, however, the acceptance factor may well be decisive, or nearly so. Thus, we expect that a technique that satisfies the *Frye* test will usually be found to be reliable as well. On the other hand, a known technique which has been able to attract only minimal support in the community is likely to be found unreliable.

Petitioner's evidence, which failed the *Frye* test, also would fail the balancing test or any other reasonable standard designed to identify legitimate expert testimony. Petitioner contends (Pet. 13 (footnote

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omitted)) that "[t]he proffered testimony would have offered the jury another explanation for the defendant's behavior, *i.e.*, that this conduct was a product of his compulsion and not of any criminal intent." Yet petitioner presented no evidence that a cash lifestyle, financial mismanagement, and the relinquishment of control over financial affairs are clinically accepted characteristics of compulsive gambling. The 1980 edition of the American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-III*) (3d ed.), which includes a reference to compulsive gambling, does not list these as diagnostic criteria associated with the disorder.[2] Petitioner's own experts did not even agree as to the status of cash lifestyle and relinquishment of control as indicia of compulsive gambling. One of the experts, Dr. Ciarrochi, was asked to give a list of "what's typical for a gambler and how they conduct their financial affairs." In response to that question, he

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[2] *DSM-III* lists two criteria for compulsive gambling: (A) that the individual is chronically and progressively unable to resist impulses to gamble; and (B) that gambling compromises, disrupts or damages family, personal, and vocational pursuits as indicated by seven characteristics, at least three of which are required to be present in an individual diagnosed as a compulsive gambler (Tr. 27-28, 316). The seven characteristics are: (1) arrest for forgery, fraud, embezzlement, or income tax evasion due to attempts to obtain money for gambling; (2) default on debts or other financial responsibility; (3) disrupted family or relationships due to gambling; (4) borrowing of money from illegal sources (loan sharks); (5) inability to account for lost money or to produce evidence of winning money, if this is claimed; (6) loss of work due to absenteeism in order to pursue gambling activities; and (7) necessity for another person to provide money to relieve a desperate financial situation (*id.* at 28).

did not mention a cash lifestyle or relinquishment of control over financial affairs. Tr. 96-97. Dr. Moravec, another of petitioner's experts, merely stated that "it was not uncommon" for a pathological gambler to lead a cash lifestyle (Tr. 135). Only the third defense expert, Dr. Resnik, stated that he had seen a cash lifestyle "a number of times" with gamblers, but even Dr. Resnik made no mention of relinquishment of control (Tr. 324). Finally, none of the government's experts mentioned a cash lifestyle, financial mismanagement, or relinquishment of control during their testimony, and petitioner did not cross-examine them about whether those traits are recognized characteristics of compulsive gamblers.

Thus, on the record developed in this case, the proffered testimony would have amounted to no more than the isolated observations of three individuals, who did not themselves agree as to the characteristics associated with petitioner's claimed mental disorder.[3] Accordingly, exclusion of the evidence was

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[3] Petitioner argues (Pet. 16-17 n.7 (citation omitted)) that even if the *Frye* test survived the adoption of the Federal Rules of Evidence, it is inapplicable here since the proffered testimony "related solely to the characteristics of compulsive gamblers and not to novel scientific evidence such as polygraph tests." But the limitations as to scientific evidence are applicable here for the simple reason that petitioner offered the expert testimony as scientific evidence in support of his defense. The evidence at issue was offered to prove that certain characteristics were, in petitioner's words, "symptoms" (*id.* at 9) or the "product" (*id.* at 13) of a mental disorder. Thus, the testimony was offered as medical evidence. To the extent that petitioner now means to suggest that the characteristics of compulsive gamblers are matters not requiring scientific expertise to explain or understand, his argument supports the district court's ruling that the subject is not one requiring expert testimony.

not an abuse of discretion under either the *Frye* test or the balancing test that is applied in some circuits.

2. Petitioner also asserts (Pet. 19-27) that Count One of the indictment, which charged petitioner with evading the payment of taxes for 12 tax years, was duplicitous and that his conviction on that count should have been reversed. That claim is without merit, and there is no conflict among the circuits on that issue that might warrant this Court's review.

Duplicity is the joining in a single count of two or more separate offenses. 1 C. Wright, *Federal Practice and Procedure: Criminal 2d* § 142 (2d ed. 1982). As the courts below pointed out (Pet. App. 3a-4a, 32a, 34a), however, it is well established that, absent unfairness to the defendant, two or more acts, each of which would constitute an offense standing alone and could therefore be charged in separate counts, may be charged in a single count if those acts may be characterized as part of a single, continuing scheme. *United States* v. *Robin*, 693 F.2d 376, 378-380 (5th Cir. 1982); *United States* v. *Berardi*, 675 F.2d 894, 897-899 (7th Cir. 1982); *United States* v. *Margiotta*, 646 F.2d 729, 732-734 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983); *United States* v. *Alsobrook*, 620 F.2d 139, 142-143 (6th Cir.), cert. denied, 449 U.S. 843 (1980); *United States* v. *Girard*, 601 F.2d 69, 72 (2d Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Zeidman*, 540 F.2d 314, 316-318 (7th Cir. 1976); *United States* v. *Daley*, 454 F.2d 505, 509 (1st Cir. 1972); *United States* v. *Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978); see also *United States* v. *Canas*, 595 F.2d 73 (1st Cir. 1979). Nothing in the court of appeals decisions on which petitioner relies (Pet. 24-25), the language of the statute, or its legislative history suggests that this principle is inappli-

cable to indictments charging the attempted evasion of the payment of taxes.

The cases on which petitioner relies on do not turn on the issue he raises. None of those cases suggests that attempts to evade the payment of taxes for a number of tax years must be charged in separate counts. To the contrary, as the courts below pointed out (Pet. App. 4a, 35a), a number of decisions support the view that such attempts may be charged in a single count. See *United States* v. *Haskell*, 327 F.2d 281, 284 (2d Cir.), cert. denied, 377 U.S. 945 (1964); *Lott* v. *United States*, 309 F.2d 115, 120-121 (5th Cir. 1962), cert. denied, 371 U.S. 950 (1963); *United States* v. *Baker*, 262 F. Supp. 657, 684 (D.D.C. 1966).

The tax evasion statute does not explicitly define the crime of tax evasion as evasion of tax liability for a single year. Rather, it refers to failure to pay "any tax imposed by this title." 26 U.S.C. 7201. Thus, to fail to pay income tax or excise tax is to violate Section 7201. Petitioner did so throughout the period from 1972 through 1983; he thus violated the plain terms of the statute. Moreover, the charging of petitioner's conduct as a single offense resulted in the reduction of the potential punishment confronting petitioner. There is no reason to read the statute as barring this more lenient method of charging the case.

The facts of this case illustrate the propriety of charging petitioner's ongoing tax evasion as a continuing offense. Year after year from 1972 to 1983, petitioner engaged in conduct designed to prevent the IRS from collecting the taxes petitioner owed. He did not change his methods every year, nor did he attempt to avoid liability for only the current year's taxes. Thus, as the court of appeals determined (Pet. App. 6a), petitioner's "activities could be regarded as evi-

dencing a continuous course of conduct. In short, as the government argues, each affirmative act of tax evasion was intended to evade all taxes owed, or which [petitioner] expected to owe, at the time of the affirmative act."

Petitioner claims (Pet. 26-27) that he was prejudiced by evidentiary rulings during the trial that were attributable to the "duplicitous" charging of Count One. Primarily, he asserts that, if each year had been charged in a separate count, evidence of wrongdoing during the years 1972 through 1977, years beyond the limitations period, would have been subject to greater scrutiny under Fed. R. Evid. 403 and would have been subject to cautionary instructions. There is no merit to petitioner's position. First, petitioner could have been prosecuted under separate counts for attempting to evade the payment of taxes for 1972 through 1977 in any event, as long as he committed affirmative acts of evasion within the six years preceding the return of the indictment, as the evidence showed he did. *United States* v. *Townsell*, 367 F.2d 815, 816 (7th Cir. 1966); *United States* v. *Baum*, 435 F.2d 1197, 1200-1201 (7th Cir. 1970), cert. denied, 402 U.S. 907 (1971). Furthermore, if petitioner had been charged in separate felony counts for each of the 12 years alleged in Count One, all of the same evidence admitted at his trial would have been admissible to prove each of the separate counts. Petitioner does not specify any particular evidence that might have been excluded or as to which a limiting instruction might have been given if he had been charged in separate counts. Thus, petitioner has failed to demonstrate that he suffered any prejudice as a result of being charged in one felony count rather than 12 felony counts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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